SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 50.

FERNAND BONIN, ET AL., PLAINTIFFS IN ERROR,

versus

THE GULF COMPANY. DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF PLEADINGS

This is an action in ejectment. It was originally brought by the Heirs of Gonsoulin, plaintiffs, against the defendant, a New Jersey corporation, in the District Court of St. Mary Parish, in the State of Louisiana, where the land claimed is situated, and was by the defendant removed to the Circuit Court of the United States.

In the original petition the plaintiffs, the Heirs of Francois Gonsoulin and his wife, stated their claim as follows (R., p. 3):

> "Petitioners now show that said Francois Gonsoulin, their grandfather and his wife, owned, at their

death, the right to a grant of land described as follows, as per surveys and confirmation since made, to-wit:

"A tract of land called Belle Isle, consisting of section nineteen (19), township seventeen (17) south, range eleven (11) east, nineteen hundred and eighteen and 75-100 acres. Section twenty-eight (28), township seventeen (17) south, range ten (10) east, nine hundred and seven and 63-100 acres. Section one (1), township eighteen (18) south, range ten (10) east, one hundred and thirty-seven and 76-100 acres. And section two (2), township eighteen (18) south, range ten (10) east, sixteen and 44-100 acres. All lying in the Parish of St. Mary, fronting on Wax Bayou and lying on the Atchafalaya Bay, in the Southwestern Land District of Louisiana, Parish of St. Mary.

"All said tract being contiguous and forming originally a grant from the Spanish Government or concession therefrom during the time when Louisiana formed a part of the dominions of Spain in America, said grant or tract described containing in the aggregate twenty-nine hundred and eighty and 58-100 acres, or thereabouts. Your petitioners show that the grant or concession above-mentioned to the property described was originally made and allowed to Dautrive Dubuclet, Benoist de St. Clair, and the Francois Gonsoulin afore-mentioned, as grantees, about the year Anno Domini seventeen hundred and eighty-three (1783), all of said grantees then residing in the province of Louisiana.

"Petitioners show that by legal and proper transfers by said Dautrive Dubuclet and said Benoist de St. Clair and their heirs, that the right and interest of the last two mentioned grantees and their heirs in and to said lands described have been and are now

vested in your petitioners as heirs of Francois Gonsoulin and his said wife, said transfers having been made since the year eighteen hundred and eight (1808), when Louisiana was acquired by the United States of America.

"Your petitioners further show that all said original grantees have been long since dead, and that a patent has issued to the heirs of Francois Gonsoulin to the lands aforesaid from the Government of the United States, after due recognition of their rights by the Commissioners of the Land Office of the United States

"Petitioners further show that their said rights to said lands are recognized in the Commissioner's reports, now in the United States Land Office, of the year eighteen hundred and seventy-five or about the year eighteen hundred and seventy-five.

"Petitioners show that their claim by said grant and concession covering said lands dates back to the year seventeen hundred and eighty-three (1783) or thereabouts, and said concession was recognized and confirmed by the United States Government *after proper and legal surveys had defined the boundaries and segregated said grants.*"

When the case reached the United States Circuit Court, defendant pleaded that the alleged heirship of the plaintiffs and their source of title were too vaguely set forth to be traversed (R., p. 9.) Plaintiffs then met this plea by a supplemental petition, which reads like a transcript of the records of the Parish Church of an Acadian Parish, setting forth their heirship and how they claim title to the land held by the defendant, originally granted by the Spanish Government in 1783 to

Francois Gonsoulin, Dautrive Dubuclet and Benoist de St. Clair, and patented by the United States to these persons on August 21st, 1878. In this petition a list of new plaintiffs appear, who join the original plaintiffs, and they pitch their title solely on the patent granted in 1878.

The defendant for peremptory exception pleaded, first, the prescription of ten years; second, the prescription of thirty years; and, third, *res adjudicata*, the latter plea being based on a suit brought in 1822 by the ancestors of all the plaintiffs against Walter Brashear, under whom defendant claimed title (R., p. 20).

Defendant thereafter appeared and disclaimed title and possession of all that portion of the property claimed in plaintiff's petition lying East of Doctor's Bayou, being all that portion of Section 19 of Township 17 South, Range 11 East, lying east of said bayou.

The cause came on to be heard on these pleas and the Court charged the jury peremptorily to find for the defendant on its pleas of prescription, and to non-suit the defendant on its plea of *res adjudicata*.

Verdict was entered accordingly, and the plaintiffs took a writ to the Circuit Court of Appeals for the Fifth Circuit which affirmed the judgment. The opinion of that Court is reported under the title of Gonsoulin Heirs vs. The Gulf Company, 116 Federal Reporter, page 251.

There was not before the Circuit Court any question except the question of prescription and the question of *res adjudicata*. There was a non-suit against the defendant on the plea of *res adjudicata*.

In the Circuit Court of Appeals there was no

question but that of prescription, and there is no other question here.

As stated above, the defendant pleads two separate prescriptions, that of ten years and that of thirty years. The law of Louisiana on the subject of these two prescriptions is found in the following articles of the Civil Code:

Art. 3473. The ownership of immovables is acquired by a longer or shorter time, accordingly as the possession has been in good or bad faith, as laid down in the following paragraph.

Art. 3474. Immovables are prescribed for by ten years, when the possessor has been in good faith and held by a just title during that time.

Art. 3475. Immovables are prescribed for by thirty years without any title on the part of the possessor, or whether he be in good faith or not.

Art. 3478. He who acquires an immovable in good faith and by a just title, prescribes for it in ten years.

Art. 3479 To acquire the ownership of immovables by the species of prescription which forms the subject of the present paragraph, four conditions must concur:

1. Good faith on the part of the possessor.

2. A title which shall be legal, and sufficient to transfer the property.

3. Possession during the time required by law, which possession must be accompanied by the incidents hereafter required.

4. And finally an object which may be acquired by prescription.

Art. 3480. The good faith spoken of in the preceding article is defined in the chapter which treats of possession.

Art. 3481. Good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor must prove it.

Art. 3482. It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription.

Art. 3483. To be able to acquire by the species of prescription mentioned in this paragraph, a legal and transferable title of ownership in the possessor is necessary; this is what is called in law a just title.

Art. 3484. By the term *just title* in case of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property.

Art. 3485. And in this case, by the phrase *transfer of the ownership of the property*, we understand not such a title as shall have really transferred the ownership of the property, but a title which by its nature, would have been sufficient to transfer the ownership of the property, provided it had been derived from the real owners, such as a sale, exchange, legacy or donation.

Thus, prescription could not be acquired under a title resulting from a lease or loan, because these contracts do not transfer the ownership of the property.

Art. 3486. It is necessary besides:

1. That the title be valid in point of form; for if the possession commenced by a title void in that respect, it cannot serve as a foundation for prescription.

2. That the title be certain; thus, every possessor who cannot fix exactly the origin of his possession, cannot prescribe.

3. That the title be proved; for as it consists in a fact it is not presumed, and every man who founds his title on a written instrument must produce it, or prove the contents, if it be lost.

Art. 3487. To enable one to plead the prescription treated of in this paragraph, it is necessary that the possession be distinguished by the following incidents:

1. That the possessor shall have held the thing in fact and in right, as owner; when, however, it is only necessary to complete a possession already begun, the civil possession shall suffice, provided it has been preceded by the corporal possession.

2. That the possession shall have been continuous and uninterrupted, peaceable, public and unequivocal; a clandestine possession would give no right to prescribe; but he who possesses by virtue of a title cannot be considered as a clandestine possessor, for his title leads to the supposition that the possession commenced in good faith, and that is sufficient to enable him to plead prescription.

Art. 3492. The actual possessor, when he proves that he has formerly been in possession, shall be presumed also to have been in possession in the intermediate time.

Art. 3493. The possessor is allowed to make the sum of possession necessary to prescribe, by adding

to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title.

Art. 3494. By the word *author* in the preceding article, is understood the person from whom another derives his right, whether by a universal title, as by succession, or by particular title, as by sale, by donation, or any other title, onerous or gratuitous.

Thus, in every species of prescription, the possession of the heir may be joined to that of the ancestor, and the possession of the buyer to that of the seller.

Art. 3496. We do not consider as an interval between two possessions, that which takes place between the decease of the testator and the acceptance of the succession by the heir; the possession of the deceased being considered in law as continued in the person of his heir.

Art. 3499. The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith.

Art. 3500. The possession on which this prescription is founded must be continuous and uninterrupted during all the time; it must be public and unequivocal, and under the title of owner.

Art. 3501. The possession necessary for this species of prescription, when it has commenced by corporal possession of the thing may, if it has not been interrupted, be preserved by external and public signs, announcing the possessor's intention to preserve the possession of the thing, as the keeping up of roads and levees, the payment of taxes, and other similar acts.

Art. 3503. How favorable soever prescription

may be, it shall be restricted within just limits. Thus, in the prescription of thirty years, which is acquired without title, it extends only to that which has been actually possessed by the person pleading it.

STATEMENT OF FACTS

The facts shown on the trial of the case are undisputed, and are as follows:

In 1783 the Spanish Government granted to Dautrive Dubuclet, Benoist de St. Clair and Francois Gonsoulin, an Island called "Belle Isle" on the Bay of Chafalaya, about four leagues west of the mouth of the Chafalaya and about thirty-two leagues from Attakapas, said Island containing about one league in front by the ordinary depth. (R. p. 66).

The grant was made to enable the grantees to raise hogs for the purpose of supplying New Orleans with pork.

The grantees never raised any hogs or furnished any pork, never occupied the property granted, or exercised any ownership over it.

The grant directed the Surveyor General to put the parties in possession of the island, confining them to the front and depth specified in their petition for the grant. There is nothing to show that this order of survey was ever executed, or that the grantees ever had any occupancy of the island.

On July 30th, 1802, an order of survey was issued by Moralis, Intendant of the Province of Louisiana, for 371 superficial arpents, in favor of Samuel Watson, on

the Island known as Belle Isle, in the County of Attakapas, in the bay of Chafalaya. This land was surveyed by Carlos Trudeau, the Surveyor General of the Province, on November 8th, 1802. Watson, the grantee of this grant, made a settlement on this property prior to December 20th, 1803, and thereafter remained in possession until his title was divested by a judicial sale made to John N. Kershaw, by the Parish Judge of Attakapas Parish, which was the name of the Parish in which the land was then situated, on February 27th, 1808, the formal deed of the Judge being dated July 25th, 1809. (R. p. 32). In this deed the property is described as the tract or parcel of land known by the name of "Belle Isle," situated near the mouth of the Chafalaya, and the sale was made of "all the above described tract or parcel of land, situated as aforesaid, containing the whole island of fifteen hundred acres, more or less."

On July 24th, 1809, J. N. Kershaw, the purchaser at this judicial sale, sold this property by warranty deed to Henry Johnson by the same description (R., p. 34).

On August 5th, 1809, Henry Johnson sold this property by a quit-claim deed to Walter Brashear, describing it as a certain tract or parcel of land called "Belle Isle," situated near the mouth of the River Chafalaya, in the territory aforesaid, supposed to contain about 1,500 acres.

Walter Brashear, claiming under Samuel Watson, presented his claim for Belle Isle Island to the Board of Land Commissioners appointed to examine, confirm and

report on titles in Louisiana, under the Act of Congress, approved March 3rd, 1807.

On July 22nd, 1811, the said Board confirmed this grant absolutely, as they had the power and were directed to do under said act as to all persons who were in actual possession of property under grants from the Spanish or French Governments prior to December 20th, 1803. This confirmation describes the land as a tract containing 371 superficial arpents, equal to 313.19 American acres, described as situated in the County of Attakapas, on the Island known by the name of "Belle Isle," in the Bay of Chafalaya (R., p. 63).

Walter Brashear remained in possession of the whole of Belle Isle Island, as owner and possessor, until he died in 1860. For many years prior to 1840 he made this Island his home. His wife and four of his children are buried there.

The natural boundaries of the Island are Wax Bayou, on the north and west; Doctor's Bayou, on the east; and Atchafalaya Bay, on the south. All of the land in these limits, consisting of about 400 acres of high land, and 1500 to 2400 acres of trembling prairie or marsh land, has always been known as "Belle Isle." The land within these limits is what the defendant now possesses and claims, and what all its predecessors in title and possession have claimed and possessed since 1809.

After Doctor Brashear's death, in 1860, the property passed into the possession and ownership of his heirs.

On April 24th, 1869, "Belle Isle Island" was sold,

together with other property, by the United States Marshal of the District of Louisiana, to R. B. Lawrence, under a writ of *fi-fa* issuing from the Circuit Court of the United States, in the case of E. Warfield, et al., vs. the Heirs of Walter Brashear, No. 161 of the docket of the U. S. Circuit Court, and on April 30th, 1869, the Marshal executed his deed for the same in due form of law, which was recorded in the Parish of St. Mary on June 15th, 1869 (R., p. 36).

In this deed, the property is described as a "tract of land fronting on Wax Bayou and Atchafalaya Bay, in the Parish of St. Mary, containing 400 acre of land, more or less, and known as "Belle Isle Island."

Under this deed, R. B. Lawrence went into possession of this land, as above described, *i. e.*, the whole Island bounded by Wax Bayou, Atchafalaya Bay and Doctor's Bayou, and remained in possession thereof, as owner, and in good faith, until July 20th, 1892, when he sold the same to R. B. Withers (R., p. 40).

In the deed from Lawrence to Withers, this property is described as a certain tract of land called "Belle Isle," situated, lying and being in the Parish of St. Mary, State of Louisiana, bounded on the west by Wax Bayou, upon which said Island fronts, and on the south by Atchafalaya Bay, and on the east by Doctor's Bayou, containing 400 acres of high land, more or less, and twenty-four hundred acres sea marsh, or pasture lands, in all twenty-eight hundred acres, more or less.

No demand was ever set up for this property by

any of the Gonsoulins during the twenty-three years it was in the possession of Lawrence. He never heard of their claim until he came to sell the property to Withers, in July, 1892, when it was discovered that in 1878 they had obtained from the United States a patent based on their old Spanish Grant, which had been adjudged against them in a suit brought by their ancestors against Walter Brashear, in 1822, which patent they had recorded in the Parish of St. Mary in 1887 (R. p. 102).

Both Lawrence's lawyer and the lawyer of Withers pronounced this claim null and void.

Withers went into possession of the Island, as above described, and held it as owner, in person, and by his tenants, and in good faith until May 15th, 1897, when he sold it to G. A. Dorwin.

A. F. Lucas, who, under a contract with Withers, had an interest in the mineral rights in the Island, sold his interest to Dorwin, by deed dated May 17th, 1897.

Withers made his home on the Island and was living there with his wife when Dorwin bought.

Dorwin went into possession of the whole Island, and lived there, conducting borings and examinations for minerals. The title was examined for him by his counsel, Messrs Farrar, Jonas & Kruttschnitt, who declared the same perfect.

None of the Gonsoulins ever made any claim to this property either as against Withers or as against Dorwin.

On March 31st, 1898, Dorwin sold the whole Island, as above described, to the Gulf Company, of New Jersey, the defendant, who went into possession thereon.

On June 30th, 1898, the plaintiffs instituted this suit.

Let us return at this point and trace the acts of the Gonsoulins and others relative to their grant of Belle Island in 1783.

They slept upon this grant, doing nothing under it until the Board of Land Commissioners above referred to was appointed.

They presented their claim for confirmation to this Board.

In their report, dated May 1st, 1815, this Board placed this claim in what was known, under the Act of March 3rd, 1807, as the second class, or Class B, which covered those claims, which, though not embraced by the provisions of the several acts of Congress, ought, nevertheless, in the opinion of the Commissioners, to be confirmed in conformity with the laws, usages and customs of the Spanish Government.

The report of the Commission on this Gonsoulin claim is No. 33, and is found at page 66 of the record.

By Act of Congress of April 29th, 1816, all land claims thus reported by the Commission were confirmed.

On May 1st, 1822, the widow and children of Francois Gonsoulin, then deceased, and one of the two sons of Benoist de St Clair, then deceased, the former claiming by deed the interest of the other heir of Benoist de St. Clair, and the whole interest of Dautrive Dubuclet, brought an action of ejectment against Walter Brashear, to recover Belle Isle Island, averring that he had entered upon said tract of land and taken possession of the same,

alleging, publishing and declaring that the same was his property and that plaintiffs had no right to the same.

The plaintiffs set up as their source of title the Spanish grant of 1783 to Francois Gonsoulin, Dautrive Dubuclet and Benoist de St. Clair and its confirmation by the Government of the United States.

The prayer of the petition was that the court decree that the titles of the petitioner to said land are just and legal, and that Walter Brashear had no title to the same as against the petitioners; that he be perpetually enjoined from setting up any title to the same, and that the Sheriff be directed to put plaintiffs in peaceable possession thereof (R., pp. 73-74).

The defendant, Walter Brashear, appeared and set up his confirmed grant on the order of survey and settlement in favor of Samuel Watson. He claimed the premises by possession under just title and in good faith since July 30th, 1802, and pleaded the prescription of ten and twenty years.

On April 26th, 1825, a judgment was entered in this cause in favor of Walter Brashear, in which it was "ordered, adjudged and decreed that the defendant be forever quieted in the possession of the land and property in dispute against all claims and pretensions in favor of the plaintiffs, according to the limits as fixed by the survey of James L. Johnson, made and returned by order of the court (R., p. 77).

This cause was appealed to the Supreme Court of Louisiana. That court affirmed the judgment below at

the August term, 1826; and its opinion is reported in 5th Martin's New Series, p. 33, and is as follows:

"Porter, J., delivered the opinion of the Court:

"The plaintiffs claim a tract of land in possession of the defendant, who pleads title to it in himself.

"Both parties assert a right to the premises in virtue of orders of survey issued by the Spanish Government, and since confirmed by the Commissioners of the United States. The *locus in quo* is admitted to be the same.

"That of the plaintiff is eldest. It is dated in the year 1783. The petitioners, in their *requete*, state; that the island which they solicit is situated about four leagues to the west of the mouth of the river Chafalaya, and that they wish to obtain a title in order that they may form an establishment, to supply the capital in case of need with pork and bacon.

"The commandant of Attakapas certified that the land solicited is of no value, except for the objects mentioned in the requete. The governor directs the surveyor general to place the petitioners on the land solicited, conformably to their memorial.

"From the issuing of this order of survey up to the time of applying for the commissioner's certificate, in the year 1816, it does not appear that the plaintiffs, or those under whom they claim, ever exercised any acts of ownership over the land in question. They never placed slaves or hogs on it, as they stated in the petition they would do; nor ever paid taxes on it as making a part of their property. An attempt was made on the trial to prove they had complied with the engagements contained in their requete, but the evidence wholly fails to establish it.

"The title of the defendant is founded on an order of survey dated in the year 1802. An actual survey

of the premises was made. An actual settlement took place, and with the exception of three or four years' absence, during which time taxes were regularly paid, the land has been inhabited up to the commencement of this suit.

"The government of the United States have relinquished their title to both, and the parties, so far as their rights may depend on any sanction from that source, stand with equal pretensions before the court. They are, therefore, both thrown back on their titles, under the former government. If these titles were complete grants, their date would decide the question, for the title having once passed from the sovereign to the subject, he could not grant it to another. But the orders of survey on which each of the parties claim, left the title or dominion of the soil vested in the government. They furnished an equitable right to those in whose favor they issued, to demand a title of the grantor, but nothing more; a reference to the various negotiations made by the Spanish authorities during the time Louisiana was possessed by that government, we think clearly shows, that the dominion of the soil was not to be considered as vested in the person applying for land, until the grant issued. The government of the United States, when they took possession of the country, by requiring all those who had inchoate titles to present them for approval, showed that they considered they required confirmation and a patent to vest the title.

"As, therefore, the legal title was not vested in either plaintiff under the former government, their rights must be decided by ascertaining which of them had the strongest equitable one, or, in other words, which of them, according to the laws, usages and customs prevailing while that government had pos-

session of Louisiana, would have had the best right to the premises.

"We think there cannot be a doubt the defendants would. The policy of the Spanish government, as is well known, was to invite emigration and promote the settlement of the country. All the general regulations in relation to land in the province and almost every order of survey they issued, proves that the motives just mentioned were the ruling ones. Repeated proclamations of the governors declared all orders of survey null, the land conceded in which was not settled within a limited time. The plaintiff's pretensions tried by this test are entirely defective. In 1783 their ancestor applied for the land, and held out to the government as an inducement to grant it, that it was unfit for any other purpose but that of raising hogs, and that if given to him he would proceed to place slaves and swine there to succor the capital with meat of that kind. During the space of nineteen years that elapsed from the granting this order of survey until the issuing the second he failed to comply with the promise. It was not surveyed, nor settled, nor even taxes paid on it. Under such circumstances, as there was no legal obligation on the part of the government to issue a grant for the land, we are satisfied there was no moral one. And we are of opinion that if the parties now before us were each claiming a title from the Spanish Government had it remained here, and contesting the validity of each other's pretensions, that the title of the defendant would prevail.

"This opinion renders it unnecessary to examine the question of prescription.

"It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs."

Nothing of this record remains except the judicial record now existing in the Parish of St. Mary. The original record and all its documents are all gone, and the record in the Supreme Court was burned. Only the reported opinion remains, which was offered in evidence and made part of the record (R., pp. 26 and 83).

After this decision in 1826, the Gonsoulins remained quiet for fifty-two years.

In the meantime, in the winter of 1837 and 1838, the U. S. Deputy Surveyors, A. F. Rightor and Andrew McCullom, surveyed townships 17 S. of R. 10 E., and 17 S. of R. 11 E., the division line of which passes through the middle of Belle Isle Island, and they surveyed and laid off the confirmed grant No. 33 in the Commissioner's report, to Gonsoulin and others.

As these surveyors took no notice of the confirmed grant to Walter Brashear to part of the same property covered by the Gonsoulin grant, although both grants and confirmations were on file in the Surveyor General's office, we must presume that they surveyed this Gonsoulin grant by the request and on the demand of those parties.

The field notes of this survey, thus made by Rightor and McCullom, were approved on August 1st, 1838, by H. T. Williams, Surveyor General of Louisiana (R., pp. 105 and 106).

The official maps of these townships were made up on these field notes, thus approved, showing conspicuously on their face the surveyed and confirmed grant to Gonsoulin and others under the Commissioners' Report

No. 33, and these official maps were approved by the Surveyor General of Louisiana on December 8th, 1842, and a copy thereof sent to the General Land Office and another copy to the Register's Office on December 31st, 1842, as appears by superscriptions on the official maps themselves. See map annexed to addition to record, between pages 2 and 3.

At the end of these fifty-two years' sleep, the plaintiffs on April 22nd, 1878, procured from O. H. Brewster, then Surveyor General of Louisiana, a copy of the survey of Rightor and McCullom made in 1838, and approved in 1842, made by them of confirmed claim No. 33 in favor of Gonsoulin and others, taken from the approved township map and from the field notes of these surveyors, then on file in the office of the Surveyor General, and on presenting the certificate of such survey to the Patent Office in Washington, they obtained a formal patent for such grant dated August 21st, 1878 (R., p. 101).

It appears on the face of the patent that the plat and survey was that taken from the approved field notes of A. H. Rightor and Andrew McCullom, Deputy Surveyors (R., p. 101).

There never was any other survey of this property or any other field notes, except the survey and field notes of Rightor and McCullom in 1838, and their survey was the basis of the patent.

As stated above, the field notes of this survey were approved by the Surveyor General of Louisiana in 1838, and the map into which they were incorporated was ap-

proved by the Surveyor General in 1842, and copies thereof transmitted to the General Land Office and to the Register's Office on December 31st, 1842.

After getting this patent, the plaintiffs laid down and slept for nine years more, and then woke up to put this patent of record in the Parish of St Mary on June 20th, 1887 (R., p. 102).

They then took another nap of eleven years, five months and ten days, and aroused themselves on June 30th, 1898, to bring this suit.

In this interval of seventy-two years which elapsed between the decision of the Supreme Court of Louisiana in 1826 and the filing of this suit in 1898, they never at any time, or in any manner set up the slightest claim or demand against the owners or possessors of Belle Isle.

An inspection of the Township map and the survey of Rightor and McCullom shows that the survey of the grant to Gonsoulin and others was made so as to locate part of the grant beyond the limits of Belle Isle Island, because the grant, as these surveyors interpreted it, was of a league front with the usual depth. When this league came to be measured off it stretched beyond the limits of the Island and took in all that portion of Section 19 which lies east of Doctor's Bayou, one of the natural boundaries of the Island. For that reason defendant, who never had any title or possession of anything except the Island proper, entered a disclaimer as to this part of Section 19, East of Doctor's Bayou, and the judgment in behalf of the defendant followed this disclaimer (R., p. 116).

In the absence of the survey mentioned in the judgment above quoted, rendered in 1826, made by Johnson, under the direction of the Court, we can only conjecture that it developed the same facts as those shown by the survey of Rightor and McCullom, *i. e.*, that plaintiff's grant, as surveyed, went beyond the limits of the Island, and that defendant set up no claim or title to what lay outside of the Island. The very fact that Brashear, the defendant in such case, continued in uninterrupted possession of the whole Island, as owner, for 35 years after such decision was rendered, and his heirs and their transferees have remained in such possession for thirty-eight years longer, is quite conclusive evidence as to what the Johnson survey was.

ARGUMENT.

The deeds offered in evidence by the defendant in this case were offered (1) in support of the plea of prescription of ten years; (2) in support of the plea of *res adjudicata;* and (3) in support of the plea of prescription of thirty years; not in the latter case to show title, but to show possession and the circumstances of such possession. Therefore, when we consider the plea of thirty years' prescription, we deal with these deeds, not as titles, but as proof of the circumstances of our possession. From that point of view, it appears that the whole of Belle Isle Island was sold at judicial sale in 1808, and adjudicated to John N. Kershaw, and that the Parish Judge, in confirmation of said sale, gave Kershaw

a deed, in due form of law, in July, 1809, which deed was for the whole of the tract of land known as Belle Isle Island, containing 1500 acres, more or less. It further appears that John N. Kershaw, by warranty deed, in 1809, sold all that certain tract of land called the "Island of Belle Isle," containing 1500 acres, more or less, unto Henry Johnson, and that Henry Johnson, by a quit-claim deed, in August, 1809, sold all his right, title, interest and claim in and to a certain tract or parcel of land called Belle Isle Island, supposed to contain about 1500 acres.

The suit brought, as aforesaid, by the heirs of Gonsoulin in 1822 sets up their title to a certain Island, called Belle Isle of about one league in front, from northeast to southwest, with ordinary depth, surrounded by bayous and tumbling prairies, and avers that Walter Brashear has entered upon the said land and taken possession of the same, alleging and publicly declaring that the same is his property, and that petitioners have no right to the same.

This, of course, is a judicial admission made by the ancestors of the plaintiffs in 1822 that Walter Brashear was then in possession of the whole of this Island, as claimed by the plaintiffs, claiming it as his property. This judicial admission was followed by a judgment by which the plaintiffs, as the heirs of their ancestors, are absolutely bound, and this judgment confirms Walter Brashear in the title and in the possession of this property, as against the claim of the plaintiff's ancestors. These facts, taken together with the evidence in the record, make it conclusive proof that Walter Brashear was

in possession of the whole Island in 1822, holding the same adversely to the plaintiffs, and the evidence further shows that Walter Brashear remained in possession of said property uninterruptedly, and as owner, until his death in 1860, and that it remained in the possession of his heirs uninterruptedly, and as owners, until 1869, when it was seized and sold by the United States Marshal under a decree of the Circuit Court against them, at which sale Lawrence became the purchaser, who remained in uninterrupted and undisputed possession of the same until he sold the property twenty-three years later in 1892 to Withers. Withers remaining in possession uninterruptedly until 1897, when he sold to Dorwin, Dorwin remaining in possession until 1898, when he sold to the defendant.

It is shown, without question, that this possession was open, notorious, uninterrupted, and was a possession as owner, and that such possession covered the whole of the property known as Belle Isle Island, bounded by Wax Bayou, Atchafalaya Bay and Doctor's Bayou.

BOTH PLEAS OF PRESCRIPTION ARE GOOD:

First: The Plea of Ten Years' Prescription. The Marshal's deed to Lawrence of 1869 was a deed translative of property. It is argued: (1) That this deed is not a just title under the law of Louisiana; and (2) that it did not cover the whole property.

As to the first proposition, it is only necessary to say that it has long been settled in Louisiana that both a Sheriff's and a Marshal's deed, under a *fi-fa*, issued

under a judgment, are a just title, within the terms of Articles 3478 and 3485 of the Revised Civil Code. See Walden vs. Canfield, 2 Rob., page 466, which is the case of a Marshal's deed. Leduf vs. Bailly, 3 Ann., page 8, which is the case of a Sheriff's deed.

It would be, indeed, an intolerable condition of law, if the purchaser at an execution sale did not have a just title translative of property which would enable him to prescribe like any other title holder, but must be placed on the same plane as the trespasser and the wrongful holder and could only prescribe by thirty years' possession.

This deed is in the usual form of Marshal's deeds, and conveys the property. It declares that "I, the said Marshal, in consideration of the premises, and by virtue of the law in such case made and provided, *do sell and transfer the said before-described property* (with the exception above noted), *to the said Robert B. Lawrence,* and all the rights and titles which the said heirs of Walter Brashear had in the said before described property. To have and to hold the same to the said Robert B. Lawrence, his heirs and assigns forever" (R. p. 39).

As to the second proposition, the language of the deed describing the property is "a tract of land fronting on Wax Bayou and Atchafalaya Bay, in the Parish of St. Mary, containing 400 acres of land, *more or less, known as Belle Isle Island.*" Under the law of Louisiana, as set forth in Articles 2491-92-93-94 of the Civil Code, this deed carried title to the whole Island, irrespective of the number of acres which it contained, whether more or less

than 400 acres. These articles refer to a sale made by act and deed of the party, but the principles therein enunciated also apply to sales at auction and to judicial sales. These articles govern the cases where there is more or less acreage contained in the property which is sold, than is set forth in the agreement. The title to all of the property passes by the act of sale, and Article 2498 restricts the right of action for supplement of the price on the part of the seller, or for any diminution of the price or for the canceling of the contract on the part of the buyer, to one year from the day the contract is made.

Under these articles, there can be no doubt, as above stated, that the title to the whole of Belle Isle passed to the purchaser at Marshal's sale. The property was sold for a lump sum as a tract of land containing 400 acres, more or less, known as Belle Isle Island. It was not sold at so much per acre with a designation of the acreage.

This case is covered exactly by the terms of Article 2494, which says "that in all other cases, whether the sale be of a certain and limited body, or of distinct and separate objects, whether it first set forth the measure, or the designation of the object, followed by its measure, the expression of the measure gives no room to any supplement of price, in favor of the seller, for the overplus of the measure; neither can the purchaser claim a diminution of the price on a deficiency of the measure, unless the real measure comes short of that expressed in the contract, by one-twentieth part, regard being had

to the totality of the objects sold; provided there be no stipulation to the contrary."

It thus appears that under this Article no relief whatever is given to the seller for the overplus of measure in the specific thing sold. The buyer alone is given relief where the measure falls short

The evidence shows that under this deed Lawrence was put into possession of the whole of the Island, and the certificate annexed to the depositions of R. S. Withers, found on page 93 of the record, signed by the heirs of Walter Brashear, shows how they understood the deed to R. B. Lawrence. Lawrence was in possession of this property for twenty-three years under this deed, before he sold to Withers, and before he ever had any knowledge of the claim of the Gonsoulin heirs.

Second: THE PRESCRIPTION OF THIRTY YEARS. Even if we start with the year 1827, and consider Walter Brashear in possession of this property only from the date when the decision of the Supreme Court in the case of Gonsoulin against Brashear, became final, Walter Brashear and his heirs and transferees were in possession of said property, as owners, without dispute, openly and notoriously for seventy-two years before plaintiffs brought this action.

But the plaintiffs claim that the statute of limitations could not run against them until they got their patent from the Government of the United States in August, 1878. Even if we should grant the correctness of this claim that R. B. Lawrence's prescription could not run against them until 1878, yet such prescription was com-

plete in 1888, nearly ten years before this suit was brought. But this claim that prescription did not run against them until 1878 is without foundation in law, for two reasons:

First: In the case of confirmed grants, like the one in question of a specific tract of land, it is settled jurisprudence of the United States and of the State of Louisiana, that the provisions of the law of confirmation relative to survey and patent add nothing but a muniment to the title; that the grant completes the title, and not the survey and patent.

Langdeau vs. Hanes, 21 Wall. 521.

Morrow vs. Whitney, 95 U. S. 551.

Whitney vs. Morrow, 112 U. S. 693.

Joplin vs. Chachere, 122 U. S., p. 94.

The last mentioned case is the exact counterpart of the case at bar, and is based just as this case is based upon a Class B claim, reported by the Commission, under the Act of March 3rd, 1807, and confirmed by the Act of Congress of April 29th, 1816. The arguments advanced by the plaintiff in that case are the same as those advanced here. The authorities relied on are the same. In that case the claim was on a patent which issued as late as 1900 on the confirmed grant of 1816.

The grant of an Island which has a known geographical name at the time the grant is made, and retains that name more than 100 years later, is about as definite and specific as a grant can be.

It has been the settled jurisprudence of Louisiana for many years, that the holder of such a confirmed grant

of an inchoate Spanish title can be prescribed against. Such was the declaration of the Supreme Court of Louisiana in Winston vs. Provost, 6th Ann., p. 166, in which case they maintained the thirty year prescription against the owner of such a title. The same doctrine is laid down by this Court in Langdeau vs. Hanes, *supra*.

Second: Even in cases where a survey is necessary to divest the Government title, such survey when made as the law directs, and approved by the Surveyor, vests the title, and subjects the land covered by such survey to all the duties and obligations of private ownership. See Joplin vs. Chachere, *supra*.

The record shows that there never was any survey made of Belle Isle Island by the officials of the Government of the United States, except that made by Rightor & McCullom in 1838. The approval of the survey of Rightor & McCullom was made by H. T. Williams, Surveyor General of Louisiana, on August 1st, 1838, and is found on pages 105 and 106 of the record, and is in these words:

"SURVEYOR GENERAL'S OFFICE,
"Donaldsonville, August 1st, 1838.

"The foregoing field notes from page 1 to page 76, inclusive, in the Southwestern District of Louisiana, surveyed by A. F. Rightor and A. McCullom, deputy surveyors, under contract of 8th of October, 1837, have been examined and approved.

"(Signed.) H. T. WILLIAMS,
"Surveyor General of Louisiana."

The testimony of the Clerk of the Surveyor General shows that these original field notes are now in the

office of the Surveyor General of the United States, in the State of Louisiana, and the certified copy of so much of said notes as pertained to the survey of Belle Isle, and the adjacent townships, with the approval thereof, was offered in evidence. This Clerk also identified the original official maps of T. 17 S., R. 10 E., and T. 17 S., R. 11 E., in the Surveyor General's Office, and the map now before the Court is a copy of that original map. This map shows that it was made from the approved field notes of Rightor and McCullom, and that no other field notes and no other surveys were ever used to make the map which now stands in the office of the Surveyor General as the official map of those townships. This official map was approved, as stated above, on December 8th, 1842, by W. T. Newcomb, Surveyor General of Louisiana, and copies thereof were sent to the General Land Office and the Register's Office on December 31st, 1842, as appears by inscription on the map. This official map contains this statement: "All the boundaries, section lines, lines of private claims and traverse of this Township were surveyed in the winter of 1837-8 by A. F. Rightor and Andrew McCullom, Deputy Surveyors, under contract of 10th of October, 1837, and were paid for in the third quarter of 1838."

The certificate of Brewster, Surveyor General, offered in evidence by the defendant, and which is copied into the patent, shows that it was made up from the field notes of Rightor and McCullom. It does not purport to approve those field notes, but purports to be such a certificate as the grantee was entitled to get from his

office to make the basis of the patent. If Brewster ever approved the field notes of survey of Rightor & McCullom, his approval would be found on the original field notes, or on the official Township maps, but the certified copies of such field notes and of such Township maps do not show any such approval by Brewster. An examination of the opinion of the Supreme Court of Louisiana in the case of Joplin vs. Chachere, 107 Louisiana, 522, which was affirmed by this court, *supra*, shows that the Counsel in that case used the same argument relative to the certificate sent to the Patent Office at Washington, on which the patent in that case issued, and which is copied into the patent, just as in this case, and that the Supreme Court of Louisiana disposed of the contention in these words:

> "If, however, a survey of the claim was necessary in order to complete the transfer of ownership of this property to Joplin, we are satisfied that a survey of the same was made and approved by the Surveyor General, W. J. McCulloh, as far back as 1856. The present Surveyor General of Louisiana refers to the survey and field notes of Phelps as having been approved, but not as a matter of original approval by himself, as the plaintiff seems to contend."

If, therefore, this private claim, Commissioner's Report No. 33, was surveyed in 1838 by Rightor and McCullom, and that survey approved by the Surveyor General in 1838, then prescription began to run against the plaintiffs and their ancestors either from that date, or from the approval of the township map in 1842, and the

prescription of thirty years was complete in 1872, twenty-six years before this suit was brought.

In their original petition (R., p. 4) the plaintiffs averred "that their claim by said grant and concession covered by said lands dates back to the year 1783 or thereabouts, and said concession was recognized and confirmed by the U. S. Government *after proper and legal surveys had defined the boundaries and segregated said grants.*"

Inasmuch as the only survey shown by the record is that of Rightor & McCulloh in 1838, and inasmuch as their own patent is based on that survey, how can they escape the force of their judicial averment that such survey was "proper and legal," and that it had defined the boundaries and segregated said grant?

Plaintiffs did in 1878 nothing more than what they could have done in any of the years prior thereto and subsequent to 1838; *i e.,* get from the Surveyor General a certificate of the survey of their grant, made in 1838 and then approved, and forward the same to the land office at Washington and get their patent.

Third: The plaintiff's title became complete and absolute by the confirmatory act of Congress of April 29th, 1816 (U. S. Statutes, Vol. 3, p. 328), which declared: "That the claims marked B and described in the several classes in the above-mentioned reports of the commissioners for the Western District of the State of Louisiana, formerly territory of Orleans, and recommended by them for confirmation, *be and the same are hereby confirmed*: Provided, nevertheless, that under no one claim shall

any person or persons be entitled, under this act, to more than the quantity contained in a square league."

The claim thus confirmed by words *in presenti* was for a specific thing—for "an island called 'Belle Isle'" (R., p. 66). In their petition to the Spanish Government the claimants described it as "an island of woods on the Bay of Chafalaya, about four leagues west of the mouth of the Chafalaya, and about thirty-two leagues from Attakapas, which island is surrounded by trembling prairie or marsh."

They represented this island to contain about one league front by the ordinary depth.

No survey of this island was needed under the confirmation unless it should be found to contain more than a square league, because that was the limit of the confirmation. But the survey of Rightor & McCullom, and the testimony in this record show that the Island contained very much less than a square league. In truth and in fact, the complainants under their survey have obtained more than they got under their confirmed grant. They were not entitled to anything but "Belle Isle"—the island of woods surrounded by trembling prairie and marsh. Their survey takes them far beyond the limits of the island to the eastward, and covers all that part of Section 19, East of Doctor's Bayou, which is the bayou running straight north from Lake Belle Isle to Wax Bayou. This part of their survey is what the defendant disclaimed title to. On their survey, and in the township map from which it is taken,

"Belle Isle" is marked and located as west of Doctor's Bayou.

There was no acreage specified in the claim. There was none specified in the report of the commission. The claim was for the island. The confirmation was for the island. The survey was for a league front, with a depth back to Wax Bayou. This league front was a gift from the surveyors and the federal officials who approved the survey, as to all that part of it which extended beyond the limits of the island.

If there is any method by which it can be done, the U. S. Government is to-day entitled to recover from the plaintiffs the gift thus made to them by its officials of all of this survey which lies beyond the limits of Belle Isle.

Under the circumstances above stated, this case falls again on this point under the doctrine declared in Joplin vs. Chachere, *supra*.

The motive for the dissipation at this time of the somnolence of the plaintiffs about their claim to this property appears on the record. A salt mine was discovered on it in 1896, and Dorwin, the vendor of the defendant, paid $125,000 for it (R., pp. 44 and 48). How much the defendant paid for it does not appear.

The conduct of the plaintiffs after they got their patent in 1878, and their silence of 20 years is easily explicable. They got the patent in order to get title to all that part of the survey which went beyond the

limits of Belle Isle, to which they knew they had no title. They were satisfied at that time to take advantage of the misunderstanding by the surveyors of their ancestors' grant, and to rob the government of about 1200 acres of sea marsh. But when the salt mine was discovered on Belle Isle, and strangers came down to exploit it in the shape of a big New Jersey company, and the contingent fee lawyer was at hand to urge them on, the temptation was too strong

We hope that this Court will by its decree put this plaintiff family of Rip Van Winkles to sleep for all time, so that in the next one hundred and twenty-three years they will have no further cause to wake up after long intervals and renew their claims to Belle Isle, as they have at intervals since 1783.

Respectfully submitted,

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